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EASTERN CHINA UNITED SEA SDN BHD

v.

ARK VENTURE HOLDINGS SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D1-22-966-2006]
6 NOVEMBER 2008

C ***CIVIL PROCEDURE:*** *Service - Service on corporations - Writ of summons and statement of claim - Service on a staff of company at principal office - Whether valid - Rules of the High Court 1980, O. 62 r. 4(1)*

D ***CIVIL PROCEDURE:*** *Service - Service on corporations - Writ of summons and statement of claim - Change of business address - Allegation of - Failure of company to notify Registrar of Companies - Whether company could rely upon change of address to defeat service*

E This was an appeal by the plaintiff against the decision of the senior assistant registrar allowing the defendant's application to set aside a default judgment entered by the plaintiff against the defendant by reason of the defendant's failure in filing its memorandum of appearance. Briefly, the plaintiff's claim against the defendant was for non-payment in respect of goods sold
F delivered by the plaintiff to the defendant. The writ and statement of claim were served on the defendant on 18 July 2006. The affidavit of service was filed on 1 August 2006. No appearance was entered by the defendant. Judgment in default of appearance was entered by the plaintiff on 1 August 2006. On 14 February
G 2007, the defendant filed an application by way of summons in chambers to set aside the default judgment on the ground that the judgment was irregularly obtained. The application was allowed by the senior assistant registrar and hence this appeal. The issue that arose in this appeal was whether the default judgment
H obtained by the plaintiff was a regular judgment. It was the submission of the defendant that the default judgment obtained was irregular because the service of the writ of summons and the statement of claim was not valid, thus it ought to be set aside *ex debito justitiae*. The defendant disputed the plaintiff's assertion that
I the writ and statement of claim were served on the defendant at the principal place of business of the defendant and alleged that the Jalan Pinang Kuala Lumpur address had ceased to be the

principal place of business/principal office of the defendant on the day that the service was alleged to have been effected on them. The defendant maintained that on that day (18 July 2006) the principal place of business/ principal office of the defendant was their new premises at Off Jalan Batu Tiga Lama, Klang, Selangor and that they had moved to the new premises in May 2006. However, the defendant in its affidavits failed to mention as to whether the plaintiff or the Companies Commission was informed of the change of the principal place of business of the defendant; and if so when was the plaintiff or the commission notified.

Held (allowing appeal with costs):

(1) The writ of summons and the statement of claim were served on a staff of the defendant at a premises known as Suite 9-3, Level 9, Wisma UOA II, Jalan Pinang, 50450 Kuala Lumpur. According to the affidavit of service of the plaintiff, the said staff of the defendant had acknowledged receipt of the writ and statement of claim by affixing the defendant company's chop and writing at the back of the writ of summons. On the authority of O. 62 r. 4(1)(b) of the Rules of the High Court 1980, this mode of service *ie*, service on a staff of the company at the principal place of business/principal office of the defendant was valid. (para 19)

(2) The affidavit of the plaintiff's process server clearly stated that the Jalan Pinang (Kuala Lumpur) office was the principal place of business/principal office of the defendant company at the time of the service. Before filing the writ in order to ascertain the principal place of business/principal office of the defendant, the plaintiff had done a search at the Companies Commission Malaysia on 29 March 2006. The search revealed that as at 29 July 2005, the registered office of the defendant and the principal office/principal place of business of the defendant were in Damansara Utama and Jalan Pinang respectively. (paras 23 & 24)

(3) As the defendant had failed to disclose as to whether or when the plaintiff or the Companies Commission was notified of the change of address of the defendant's place of business, and further considering that the defendant's company search only stated the position (regarding the defendant's registered office address and place of business address) as at 3 August 2006, therefore, an inference may fairly be made that on the date of

A the service of the writ and statement of claim on the defendant at the defendant's principal place of business (that was 18 July 2006) the officially notified place of business of the defendant was still at the Jalan Pinang, Kuala Lumpur office. Moreover, the defendant had failed to explain the
B acknowledgment of receipt (particularly the stamping of the defendant's chop) that appeared at the back of the writ. (para 28)

(4) There is the principle that a company that has changed its
C registered office without notifying the Registrar of Companies as required by the Companies Act 1965 cannot rely upon the change to defeat service that was properly effected at its former registered office, especially when the fact of the change is not known to the plaintiff at the time of service. This
D principle equally applies to any change of the business address of the company. There is a legal duty for the defendant to notify the Companies Commissions of any change of business address. The service effected at the principal place of business/ principal office of the defendant at the Jalan Pinang Kuala
E Lumpur office was valid by virtue of r. 4(1)(b) of O. 62 of the Rules of the High Court 1980. (paras 29 & 30)

(5) Since the service of the writ and statement of claim on the defendant at the Jalan Pinang premises was valid, it followed
F that the default judgment entered by the plaintiff was regular and valid. (para 31)

Case(s) referred to:

MUI Bank Bhd v. Golden Hornbill Hotel Sdn Bhd [1993] 1 CLJ 204 HC ***(refd)***

G *Pembinaan Masyuli Sdn Bhd v. Mow Seng Housing & Land Development Sdn Bhd [1998] 3 CLJ 575 CA* ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 62 r. 4(1)(b), (c)

H **Other source(s) referred to:**

Malaysian High Court Practice, 2001 Desk Edition, vol. 1, p 2025, para 62.4.2

For the plaintiff - Mohd Nor Md Derus; M/s Nasir, Kenzin & Tan
For the defendant - Munir Abdullah; M/s Munir & Co

I

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus J:

[1] This is an appeal by the plaintiff against the decision of the learned senior assistant registrar of 19 February 2008. In her decision the registrar allowed the defendant's application to set aside a default judgment dated 1 August 2006 entered by the plaintiff against the defendant by reason of the defendant's failure in filing its memorandum of appearance.

[2] I have allowed the appeal with costs.

[3] I shall now give my grounds.

[4] The writ of summons and statement of claim were filed on 3 July 2007. The plaintiff's claim against the defendant is for nonpayment in respect of goods sold delivered by the plaintiff to the defendant. The sum claimed by the plaintiff against the defendant is RM416,120.50.

[5] The writ and the statement of claim were served on the defendant on 18 July 2006.

[6] The affidavit of service was filed on 1 August 2006. No appearance was entered by the defendant.

[7] Judgment in default of appearance was entered by the plaintiff on 1 August 2006.

[8] On 14 February 2007 the defendant filed an application by way of summons in chambers to set aside the default judgment on the ground that the judgment was irregularly obtained. The application was allowed by the senior assistant registrar.

[9] The plaintiff now appeals to the judge in chambers.

[10] The only issue in this appeal before me is whether the default judgment obtained by the plaintiff is a regular judgment. It is the submission of the defendant that the default judgment obtained was irregular; and since it was irregular, the default judgment ought to be set aside *ex debito justitiae* without the need to dwell into the merits of the defendant's defence.

[11] The learned counsel for the defendant submits that the default judgment was irregular because the service of the writ of summons and the statement of claim was not valid. The learned counsel argues that it was not valid because of the following reasons:

(a) in the case of the service of the writ and statement of claim on a director of the defendant by the name Lew Wen Teik ('Lew'), effected on 18 July 2006, it was invalid, as the said Lew was also a director of the plaintiff company; and

(b) in the case of the service of the writ and statement of claim on a staff of the defendant at an address known as Suite 9-3, Level 9, Wisma UOA II, Jalan Pinang, Kuala Lumpur, also effected on 18 July 2006, it was invalid as this premises was at the material time neither the registered office of defendant nor the principal place of business of the defendant.

[12] In the present case, to reiterate what has been said above, two modes of service were effected on the defendant, namely:

(a) personal service on a director of the defendant company: and

(b) personal service on a staff of the defendant's company at the principal place of business/principal office of the defendant company.

[13] In the case of (a) above, to repeat what has been said, the writ of summons and the statement of claim were personally served on a director of the defendant's company, namely, one Encik Lew Wen Teik.

[14] The learned counsel for the plaintiff contends that the service was valid as it is in accordance with O. 62 r. 4(1)(c) of the Rules of the High Court 1980 ('the RHC'), as Lew was a director of the defendant company. This provision states:

Rule 4. Service on corporation. (O. 62 r. 4)

(1) Where an action is against a corporation, the writ may be served:

(a) ...

(b) ...

(c) by handing a copy of it to the secretary or to any director or other principal officer of the corporation;

[15] However, the learned counsel for the defendant, on the other hand, submits that the service was not valid because Lew Wen Teik was not just a director of the defendant's company: he was also then a director of the plaintiff's company, a fact that is not in dispute. This being the case, Lew, argues counsel,

notwithstanding the fact that he was a director of the defendant, was in no position to accept service on behalf of the defendant, as here there was a conflict of interest on his part.

[16] It is also not disputed that Lew, having accepted service of the writ on behalf of the defendant company, did not take any action on the writ towards defending the defendant against the plaintiff's action; nor did he show the writ to the managing director of the defendant so that the latter could take the necessary defensive action.

[17] The defendant's counsel, in arguing that such service is not valid, however, did not furnish the court with any authority for his contention that the word 'director' in O. 62 r. 4(1)(c) does not include a director who wears two hats like the director of the defendant, Lew, in the present case. Lew, whilst he was a director of the defendant (the party being served and adversely affected by the service of the writ of summons), at the same time, he was also a director of the plaintiff (the party having an interest in ensuring that the writ of summons was served). Be that as it may, to my mind, there is no doubt that in the case of Lew, as he was also a director of the plaintiff, there is a conflict of interest situation, when he accepted service on behalf of the defendant. I think that it is fair to infer that as he was a director of the plaintiff he must have had knowledge of the plaintiff's institution of the present civil suit against the defendant.

[18] Based on the above undisputed facts and inference, I accept the defendant's submission that the service of the writ on Lew was not a valid service on the defendant by reason of the conflict of interest principle.

[19] However, there is another (and alternative) mode of service adopted by the plaintiff, that is, situation (b) as mentioned above - the service of the writ of summons and statement of claim by the plaintiff by leaving a copy of these documents with a staff of the defendant at the principal place of business/principal office of the defendant. The writ of summons and the statement of claim were served on a staff of the defendant at a premise known as Suite 9-3, Level 9, Wisma UOA II, Jalan Pinang, 50450 Kuala Lumpur. According to the affidavit of service of the plaintiff affirmed by one Aizam bin Saberi, a clerk of the plaintiff's solicitors, Messrs Nasir, Kenzin & Tan, the writ of summons and the statement of claim were served on a staff of the defendant who

A acknowledged receipt of the writ and statement of claim by affixing the defendant company's chop and writing 'Received 18/7/06' at the back of the writ of summons. The averments in this affidavit of service have never been disputed by the defendant (except on one point which I shall deal with shortly). In my judgment, on the B authority of O. 62 r. 4(1)(b) of the RHC, and *Pembinaan Masyuli Sdn Bhd v. Mow Seng Housing & Land Development Sdn Bhd* [1998] 3 CLJ 575, this mode of service, that is, service on a staff of the company at the principal place of business/principal office of the defendant (as opposed to the registered office of the company) is C valid.

[20] Order 62 r. 4(1)(b) states:

Rule 4. Service on corporation. (O. 62 r. 4)

D (1) Where an action is against a corporation, the writ may be served:

(a) ...

(b) by sending a copy of it by registered post addressed to E the corporation at the office, or, if there be more offices than one at the principal office of the corporation, whether such office be situated within Malaysia or elsewhere;

[21] The case law authorities have interpreted r. 4(1)(b) liberally F (see *Malaysian High Court Practice,* 2001 Desk Edition, vol. 1, p. 2025, para 62.4.2). One would have thought that the words 'by sending a copy of it by registered post addressed to the corporation at the office, or, ...' imply that this limb (b) only applies to situations where the service is by way of registered post. G However, *Pembinaan Masyuli* suggests that it is not the case: the provision also applies to non-postal service. In this case cited, the service was not by registered post. In fact it was not by post at all but by way of personal service on a clerk of the defendant company at the company's sales office (located in Seremban), H which was not the registered office of the defendant company (located in Kuala Lumpur). Nevertheless, the Court of Appeal held the service was valid by reason of r. 4(1)(b). Siti Norma Yaakob JCA (as she then was) in delivering the judgment of the court said (at pp. 579-580):

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> In the court below, the respondents objected to the fact that the writ and statement of claim was not served at their registered office in Kuala Lumpur but at their sales office in Seremban.

> We see no basis for such an objection as para (b) of r. 4(1) allows service of process to be effected at any principal office of the respondents if they have more than one. In this case, the respondents' registered office, as stated in the writ itself, is at Suite 4.02, Tingkat 4, Bangunan Yayasan Selangor, 55100 Kuala Lumpur. They also maintained another office at the material time in Seremban at No. 39, Tingkat 1, Jalan Yam Tuan, 70000 Seremban, Negeri Sembilan, this being their sales office in respect of the construction of the low cost houses that they had undertaken for the appellants. There is an admission by one of the respondents' directors in an affidavit affirmed on 12 January 1994 that at 3 pm on 10 April 1993 (the same afternoon the writ and statement of claim was served), the respondents held a board meeting at the premises attended by a representative of the appellants to discuss the amount due to the appellants. The fact that such a board meeting was held at the sales office reinforces our finding that the premises was another of the respondents' principal office used by them to conduct their business.

[22] It is to also to be noted that the Court of Appeal in the above judgment also ruled that a principal office of a company need not necessarily be the registered office of the company. The above judgment seems to imply that a corporation can have more than one principal office, and that whether an office of a company/corporation is a principal office or not is a question of fact to be inferred from the facts of each case.

[23] In the case that is now before me, the affidavit of the plaintiff's process server clearly states that the Jalan Pinang (Kuala Lumpur) office was the principal place of business/principal office of the defendant company at the time of service. This assertion is never disputed by the defendants' affidavit, except that the defendant in their affidavits claim that they had moved out of their principal place of business/principal office from Jalan Pinang, Kuala Lumpur to Jalan Pelangi, Klang, in April 2006 and have moved into a new premise in Klang in May the same year (2006).

[24] The plaintiff had no knowledge that the defendant had moved their business address from the Jalan Pinang, Kuala Lumpur, address to the new premises in Klang.

[25] Before filing the writ, in order to ascertain the principal place of business/principal office of the defendant, the plaintiff's solicitors did a search at the Companies Commission Malaysia on 29 March

2006. The search reveals that as at 29 July 2005 the registered office of the defendant and the principal office/principal place of business of the defendant were as follows:

(a) Registered office:

No. 13A, Jalan SS 21/56B
Damansara Utama
47400 Petaling Jaya
Selangor

(b) Business address:

Suite 9-3, Level 9
Wisma UOA 11
Jalan Pinang
Kuala Lumpur

[26] In the present case the writ and statement of claim were filed on 3 July 2006. This is just about three months after the above company search was made. This address (the Jalan Pinang, Kuala Lumpur, address) was mentioned in para 2 of the statement of claim as the 'business address' of the defendant. It is to be recalled that the service of the writ and statement of claim was effected on the defendant on 18 July 2006.

[27] The defendant disputes the plaintiff's assertion that the writ and statement of claim were served on the defendant at the principal place of business of the defendant. The defendant alleges that the Jalan Pinang, Kuala Lumpur address had ceased to be the principal place of business/principal office of the defendant on the day that the service was alleged to have been effected on them. The defendant maintains that on that day (18 July 2006) the principal place of business/principal office of the defendant was no longer at Jalan Pinang, Kuala Lumpur, but at their new premises, namely, at No. 2 Jalan Pelangi, Off Jalan Batu Tiga Lama, 41300 Klang, Selangor; and that they had moved to this new premise in May 2006. The defendant's affidavit exhibits a search done on 6 February 2007 at the Companies Commission of Malaysia which shows that as at 3 August 2006 the principal place of business/principal office of the defendant was at No. 2 Jalan Pelangi, Off Jalan Batu Tiga Lama, 41300 Klang, Selangor. Although the defendant claims that it had moved to the new principal place of business in May 2006, nonetheless, the defendant in its affidavits fail to mention as to whether the plaintiff

or the Companies Commission was informed of the change of the pricipal place of business of the defendant; and, if so, when was the plaintiff or the Commission notified.

[28] As the defendant has failed to disclose as to whether or when the plaintiff or the Companies Commission was notified of the change of address of the defendant's place of business, and further considering that the defendant's company search only states the position (regarding the defendant's registered office address and place of business address) as at 3 August 2006, therefore, an inference may fairly be made that on the date of the service of the writ and statement of claim on the defendant at the defendant's principal place of business (that is, on 18 July 2006) the officially notified place of business of the defendant was still at the Jalan Pinang, Kuala Lumpur office. Moreover, the defendant has failed to explain the acknowledgement of receipt (particularly the stamping of the defendant's chop) that appears at the back of the writ.

[29] If I may add, there is the principle that a company that has changed its registered office without notifying the Registrar of Companies as required by the Companies Act 1965 cannot rely upon the change to defeat service that was properly effected at its former registered office, especially when the fact of the change is not known to the plaintiff at the time of service (see *MUI Bank Bhd v. Golden Hornbill Hotel Sdn Bhd* [1993] 1 CLJ 204). In my view this principle equally applies to any change of the business address of the company as well as there is a legal duty for the defendant to notify the Companies Commissions of any change of business address.

[30] In conclusion, the service effected at the principal place of business/principal office of the defendant at the Jalan Pinang, Kuala Lumpur office is valid by virtue of r. 4(1)(b) of O. 62 of the RHC.

[31] Since the service of the writ and statement of claim on the defendant at the Jalan Pinang premises is valid, it follows that the default judgment entered by the plaintiff is regular and valid. Accordingly, the appeal must be allowed with costs.

[Appeal allowed with costs.]